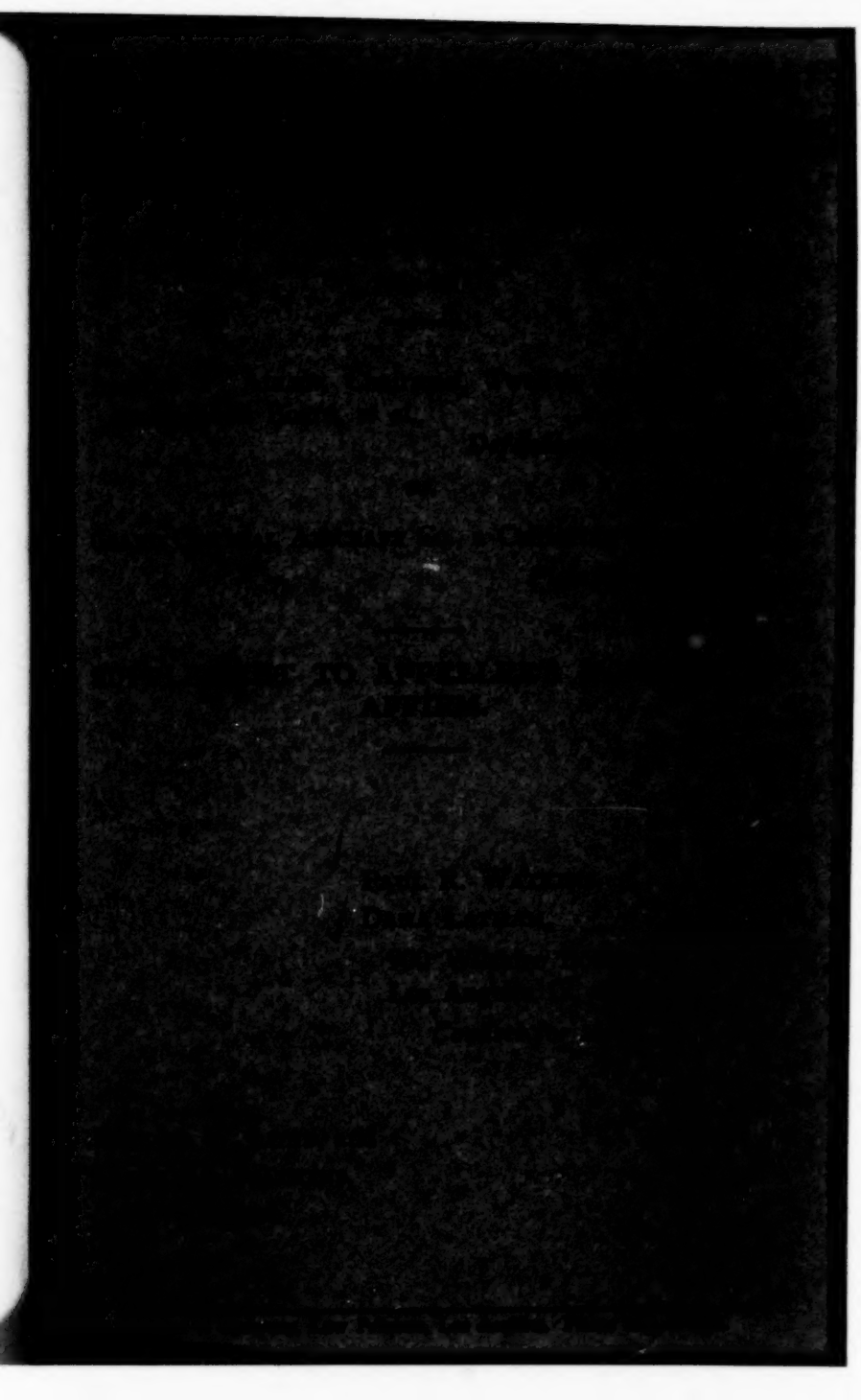


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IN THE

Supreme Court of the United States

October Term, 1953
No. 450

ARTHUR P. ALLEN, Chairman, Twelfth Region Wage Stabilization Board, *et al.*,

Defendants-Appellants,

vs.

GRAND CENTRAL AIRCRAFT CO., a California corporation.

Plaintiff-Appellee.

SUPPLEMENT TO APPELLEE'S MOTION TO AFFIRM.

This is a Supplement to Appellee's Motion to Affirm, dated October 9, 1953, and filed as part of its Statement in Opposition to Appellants' Statement of Jurisdiction. It is prompted by this Court's *per curiam* decision, on November 9, 1953, in *Franklin v. Jonco Aircraft Corp.*, No. 323, Oct. T. 1953. The administrative procedures held invalid by the District Court's judgment from which this appeal is taken are the same as those permanently enjoined by the District Court in the *Jonco* case (114 F. Supp. 392, D. C. N. D. Tex., June 14, 1953). That judgment was reversed by this Court in the following language:

> "The appellee having failed to exhaust its administrative remedy, the judgment is reversed. Myers

v. Bethlehem Shipbuilding Corp., 303 U. S. 41. Public Service Commission of Utah v. Wycoff Company, Inc., 344 U. S. 237, 246."

It is respectfully submitted that the *Jonco* case, and the two cases cited in the Court's opinion therein, are distinguishable from this case, for the reasons hereafter stated.

I.

The Myers and Wycoff Cases Do Not Require Exhaustion of Administrative Remedies Here.

The *Myers* case is distinguishable on many grounds, only some of which will be here discussed. The following are clearly sufficient to demonstrate the inapplicability of that case to the instant situation:

(1) The case involved the National Labor Relations Board. The organization, jurisdiction, and procedure of that Board was prescribed by the National Labor Relations Act which specifically granted to that Board "exclusive jurisdiction." In the instant situation, on the other hand, there is no National Enforcement Commission or other agency specifically created by the statute for the purpose of imposing penalties for wage stabilization violations. Indeed, the basis for the District Court's decision herein was that the statute provided that federal district courts should have exclusive jurisdiction in enforcement cases.

(2) Secondly, the National Labor Relations Act spelled out in detail effective court review. Indeed, the administrative order was not self-enforcing and became effective only after a decree of enforcement

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by a Circuit Court of Appeals. As this Court observed (303 U. S. at 48):

> ". . . The grant of that exclusive power is constitutional, because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And, until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it."

By way of contrast, in the instant situation there not only is no specific provision in the statute for court review, but such right is in fact negatived by the regulations and orders of the Economic Stabilization Administrator:

> "The Director of Price Stabilization and the National Enforcement Commission shall certify and forward their final determination in each case to the appropriate governmental agency or agencies. Any such determination shall be conclusive on all Executive Departments and agencies of the Government, and they shall disregard and disallow the amounts thus certified. Any determination made pursuant to this authority under the Defense Production Act, as amended, shall be final and not subject to review by the Tax Court of the United States or by any court in any civil proceeding." General Order 15, sec. 6 (17 F. R. 2994, 9977).

> "Whenever there has been a final decision in an enforcement proceeding imposing a disallowance sanction, as defined in Section 1.1 hereof, the National Enforcement Commission shall issue a Certificate of Disallowance setting forth the name and address of the respondent or respondents and the amount which shall be disallowed and disregarded by any Executive Department or other agency or departments or agencies of the government in determining the costs and expenses of the respondent. The certificate of disallowance shall be transmitted by the National Enforcement Commission to the appropriate Executive Departments or other agencies of the government and a copy served upon the appropriate board or office and the respondent. The certificate of disallowance shall be conclusive for the purposes stated therein." General Procedural Regulation No. 1, Revised, sec. 6.1 (17 F. R. 7737).

(3) In the *Myers* case, the principal issue before the Board and the court was whether the complainant was engaged in a business whose operations affected interstate commerce so as to bring it within the scope of the National Labor Relations Act. This was an issue of mixed law and fact which was peculiarly within the expert knowledge of the Board to rule on initially. In the instant situation, however, the issues before the court below involved the validity of certain administrative regulations and orders, which issues the administrative agency was not even competent to rule on! Thus, Section 10.1 of General Procedural Regulation No. 1, Revised, of

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the Economic Stabilization Administrator provided (17 F. R. 7737, 18 F. R. 1663):

> "The Enforcement Commissioner, in making his findings and determinations, and the National Enforcement Commission, in making its decisions, shall, to the extent applicable, be governed by the established regulations, interpretations, and policies formulated by the Board or office involved in the enforcement proceeding."

(4) Finally, in the *Myers* case, there was no real irreparable injury threatened. The complainant merely made a vague claim of the expenses involved in trying the issue before the Board. And yet the complainant was faced with the same expense in proving in an injunction proceeding that it was not engaged in commerce and hence was not subject to the Act. Under all the circumstances, this Court held that in the absence of threatened irreparable injury, the complainant had to exhaust its administrative remedies. Undoubtedly this is the proposition for which this Court cited the *Myers* case in its recent decision in the *Jonco* case. As we shall see below, in the instant case there are substantial elements of real irreparable injury present in addition to heavy costs involved in the administrative hearing.

The *Wycoff* case, *supra*, 344 U. S. 237, 246, 73 S. Ct. 236 (1953), involved a suit for a declaratory judgment that complainant's transportation was in interstate commerce, and for an injunction against a state regulatory commission's interference with complainant's transportation. The trial court's judgment denying the injunction was affirmed because of the complete lack of any evi-

dence as to threatened or probable acts of the defendants which might cause irreparable injury. The denial of declaratory relief was upheld upon the ground, among others, that the complaint sought not an ultimate determination of rights, but only preliminary findings intended to fortify the complainant against future regulation. The Court said the declaratory judgment procedure

> "will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body. . . . It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. *Cf.* Myers v. Bethlehem Shipbuilding Corp. . . ." (344 U. S. at 246).

This case is inapposite both because appellee here has made a strong showing of injury and because appellee's challenge of the administrative proceeding is based not on issues which can be determined by the agency in the first instance, but rather upon issues which the agency is not entitled to try in any event. The District Court found that the agency has no power to hold hearings, and that it has never had such power. It also found, as discussed below, that an adverse intermediate decision from the agency, issued prior to the agency's final determination, would result in substantial irreparable injury.

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II.

Where the Merits of the Issue Presented by the Attack on the Administrative Proceeding Cannot Be Decided by the Agency and Where Irreparable Injury Is Shown, Exhaustion of Administrative Remedies Is Not Required.

Exhaustion of administrative remedies has not been required by this Court, we submit, where the continuance of the administrative proceeding would cause irreparable injury and where the issue raised by the complaint attacking the proceeding was not one which the agency could decide. For example, in *Public Utilities Commission v. United Fuel Gas Co.*, 317 U. S. 456, 63 S. Ct. 369 (1943), it was found that the challenged orders of an administrative agency were "on their face plainly invalid" because exclusive jurisdiction had been vested in a federal regulatory agency:

> "No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act." (317 U. S. at 469.)

Accordingly the Court held that under the circumstances, the mere fact that the complainant company would incur expenses in complying with the void orders constituted sufficient irreparable injury to justify an injunction. Among numerous other decisions of this Court sustaining injunctive relief against administrative proceedings where there was irreparable injury threatened, see the following: *Utah Fuel Co. v. National Bituminous Coal*

Comm., 306 U. S. 56, 59 S. Ct. 409 (1938); *Smith v. Cahoon*, 283 U. S. 553, 51 S. Ct. 582 (1931); *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196, 44 S. Ct. 553 (1924); *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 S. Ct. 658 (1923); *Oklahoma Gas Co. v. Russell*, 261 U. S. 290, 43 S. Ct. 353 (1923); *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 39 S. Ct. 375 (1919); *Waite v. Macy*, 246 U. S. 606, 38 S. Ct. 395 (1918); *Gonzales v. Williams*, 192 U. S. 1, 24 S. Ct. 177 (1904).

The opinion in *Aircraft & Diesel Equipment Corporation v. Hirsch*, 331 U. S. 752, 67 S. Ct. 1493 (1947), recognized the principle that exhaustion will not be required where the merits of the attack upon the agency are not within its jurisdiction to determine and where there is irreparable injury, in the following words:

> "It is true that the presence of Constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention." (331 U. S. at 773.)

The principle was held not to be applicable to the facts in that case, Justice Douglas dissenting, for two reasons. First, the Court found that Congress had plainly expressed an intention in the governing statute that the administrative remedy, culminating in review *de novo* by

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the Tax Court, was exclusive. In other words, it found the exhaustion rule to have been written into the statute. Here, on the other hand, not only is there no such requirement expressed, but the main point in issue is whether the statute authorized any administrative enforcement procedure at all and whether certain of the applicable regulations and orders are, on their face, in conflict with the statute. Secondly, the Court found that (331 U. S. at 778), "without specific allegation that any of them is seriously so threatened or facts to support such a claim," there was no adequate showing of irreparable injury.

The Government does not appear to dispute the proposition that where real irreparable injury is established, an administrative proceeding will be enjoined and exhaustion of the administrative remedy will not be required. (See Appellants' Statement as to Jurisdiction, filed herein on September 24, 1953, pp. 10-13, typewritten copy.) The Government's claim is only that the trial court erred in finding that appellee would in fact suffer irreparable injury if the proceeding were not enjoined. *Ibid.* But, as discussed below, such finding by a unanimous three-judge court was clearly supported by the evidence.

III.

Appellee Should Not Be Required to Exhaust Its Administrative Remedies in View of the Nature of Its Challenge to Administrative Jurisdiction and the Strong Showing Made of Irreparable Injury.

The principle recognized in the *United Fuel Gas* case and the other cases cited should be applied here. In the first place, the District Court has determined that the National Enforcement Commission was constituted without statutory authority and had no power to hear a complaint against appellee. In other words, the orders of the Economic Stabilization Administrator creating the National Enforcement Commission, and the orders issued pursuant thereto, were "on their face plainly invalid" and no inquiry beyond the orders themselves was necessary in order to discover that they were in conflict with the statute. Nor did the Commission have jurisdiction to determine their validity. Appellee also challenges on other grounds regulations and administrative orders, the validity of which the Commission could not determine.

In the second place, the showing of injury is far more compelling than in any of the cases cited. It is in this respect that the *Jonco* decision is most easily distinguished from this appeal. The opinion of the court below (now reported at 114 F. Supp. 389, 391) summed up the facts showing injury as follows:

> "The undisputed evidence convincingly showed that the plaintiff would be irreparably damaged by the *continuance* of the administrative proceedings. . . . The evidence further showed that the *continuance* of the administrative proceedings with the overhanging threat of the disallowance penalties *would cause the banks to withdraw* the credit extended, re-

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sulting in a shut down of plaintiff's business, cancellation of its government contracts, and consequent bankruptcy." (Emphasis added.)

The evidence supporting this finding, including testimony of an official of one of the participating banks, and a copy of the credit agreement, was introduced at the trial of the case on July 24, 1953, and was undisputed.

Among the exhibits admitted into evidence was the computation of the Regional Counsel of the Wage Stabilization Board showing that total wage payments allegedly paid in violation of regulation amounted to $5,561,484.11. Of this sum, $959,857.50 was computed as the amount of the illegal excess. Under the Economic Stabilization Administrator's General Order 15, Section 4(b) (17 F. R. 2994, 9977), the former amount was subject to disallowance in the absence of a showing of extenuating or mitigating circumstances (as defined therein), and even upon such a showing the latter amount was disallowable, it being provided that if extenuating or mitigating facts were proved, nevertheless,

> "the usual and general policy shall be to disallow an amount at least equal to that portion of any payment or accrual in excess of whatever payment was permissible under the governing regulation, order or determination."

It was established that extensions of bank credit in the amounts then being made under the loan agreement were vital to appellee's continued operation, that such loans were appellee's only assurance that it would have adequate working capital to meet heavy weekly payroll and other recurring expenses. It was shown that the current agreement would expire September 30, 1953. The executive

vice-president of the bank acting as agent for the several banks under the credit agreement, a man responsible for making recommendations to the bank's board of directors regarding loan policy [Tr. p. 40], testified as follows:

"Q. Mr. Lawler, if an enforcement commissioner of the National Enforcement Commission in a proceeding involving the Grand Central Aircraft Company should make findings and determinations that wages in the amount of $5,000,000 or more should be disallowed for income tax and or an alternatively contract reimbursement purposes for the year 1951, what would be your recommendation to the Board of Directors of your bank with reference to the requests from Grand Central Aircraft Company to extend the present credit agreement beyond September 30, 1953?

The Witness: Under those circumstances, sir, I would give a negative recommendation to my Board of Directors with respect to the further extension of credit.

Mr. Lund: Q. By saying 'negative' you mean you would recommend that the bank not extend the credit agreement, is that correct? A. That is correct.

Q. Would that also be true if the enforcement commissioner's findings and determinations was that the amount of such disallowance should be $3,000,000? A. In my opinion, the recommendation should continue to be negative under those circumstances based on the financial condition of the company as I know it at this time.

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Q. And would the same be true if the findings and determinations of the enforcement commissioner was for a disallowance of a million dollars? A. Yes.

Q. Three-quarters of a million dollars? A. Yes, sir." [Tr. pp. 42-43.]

Appellants argue that only the National Enforcement Commission had authority to issue a certificate of tax disallowance, and that there could be no injury resulting from the proceedings before the Enforcement Commissioner. This argument overlooks the degree of finality which attached to the Enforcement Commissioner's determination. As provided in General Procedural Regulation 1, Revised, Section 4.1(f), 17 F. R. 7737, 18 F. R. 1663:

> "If no appeal is filed as hereinafter provided, the findings and determination of the Enforcement Commissioner shall, in the absence of clear and prejudicial error, be adopted by the National Enforcement Commission and a certificate of disallowance based thereon issue to the appropriate departments or agencies of the government."

More significantly, the argument overlooks the effect which such findings and determinations would have on the banks extending credit to appellee. As was shown in the testimony of the executive vice-president of the bank administering the loan, an Enforcement Commissioner's disallowance of any amount from the $5,000,000 maximum claimed, to $750,000, an amount substantially less than the "ordinary and usual" minimum disallowance,

would cause the banks to withdraw the vital credit being extended. Without such credit the appellee would be forced into bankruptcy. The bank's action would be taken despite proposed appeal of the case to the Commission itself.

Of course, it may be argued that an Enforcement Commissioner might decide that there was no violation, and that if he did so the need for any judicial determination of the proper interpretation of the statute, or of its constitutionality, would have been obviated. If the exhaustion rule were to be applied for this reason, then the effect would be to require appellee to gamble on the favorable outcome of an invalid administrative proceeding at the risk of being put out of business. We submit that the decisions of this Court do not require that such a risk be enforced upon appellee.

No showing of irreparable injury comparable to that detailed above supported the injunction in the *Jonco* case. Indeed, as was pointed out in the Government's Statement as to Jurisdiction therein (subd. C(II)), the only basis for the district court's finding of irreparable injury was that court's view that the company might, in the future, be subjected to sanction after a final unfavorable decision by the National Enforcement Commission, the members of which were not before the Court.

Appellants' insistence that an Enforcement Commissioner's findings were subject to appeal is irrelevant in view of the evidence showing that appellee would be bank-

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rupt, and hence unable to take an appeal. Exhaustion of administrative remedies in such circumstances becomes impossible. Hence the question is not properly one of exhaustion, but of whether appellee is to be allowed any court review at all. We submit that the present showing of irreparable injury justifies a determination by this Court that the regulations conferring appellants' claimed authority are invalid.

Dated: November 20, 1953.

Respectfully submitted,

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